

Date: August 28, 1997

Case No.: 96-INA-386

In the Matter of:

ALBERTO'S MEXICAN RESTAURANT,
Employer

On Behalf Of:

TERESA D. QUINTEROS-SOSA,
Alien

Appearance: Susan M. Jeannette, Immigration Processor
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,¹ and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On February 22, 1994, Alberto's Mexican Restaurant ("Employer") filed an application for labor certification to enable Teresa de Jesus Quinteros-Sosa ("Alien") to fill the position of Assistant Cook (AF 79-80). The job duties for the position are:

Assistant cook for authentic Mexican restaurant with recipes passed through the family for generations. Must be able to use standard restaurant equipment and utensils. Able to prepare a wide range of Mexican foods including, tacos, tostados, burritos, rice, beans, chile relleno, carnitas, carne asada, machacha etc. Garnish with lettuce, tomatoes, guacamole and salsa. This schedule allows for a thirty minute meal break. Able to step in in the absence of the cook.

The requirements for the position are six years of grade school and two years of experience in the job offered or in a related occupation as an assistant cook. Other Special Requirements are:

Must have Dept. Of Health San Diego County required Foodhandler's card. Must speak Spanish as the kitchen, owners, and many of the clients are Hispanic and speak Spanish as their native language.

On October 14, 1994, the Employer deleted the supervisory requirement (AF 80).

The CO issued a Notice of Findings on August 11, 1995 (AF 72-77), proposing to deny certification on the grounds that the Employer has failed to document: (1) that the position is for a full-time employee, that there are no unlawful terms, and that the Employer can afford to pay the salary; (2) that the job is truly open to U.S. workers; and, (3) that a U.S. worker has been recruited in good faith and rejected for job-related reasons.

The CO asserted that the Employer has not shown the ability to pay the offered wage to three workers as required by 20 C.F.R. § 656.20(c)(4), nor has it shown what hours will be worked, how often the work hours rotate, or how there will not be any overtime work hours. The CO also stated that:

If the employer has employees who are not being paid reported wages, there may be unlawful terms of employment in violation of **20 CFR 656.20 (c) (7)**, which

¹ All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

precludes labor certification. On the other hand, if the employer has workers who are not employees, being recognized as such, the job may not be a bona fide position for an employee as required by **20 CFR 656.3**. (Emphasis in original.)

Next, the CO stated that the Employer has not documented that the job opportunity is clearly open to any qualified U.S. workers as provided for in 20 C.F.R. § 656.20(c)(8). The CO questioned whether the Alien has been working without pay as there is no record of paying wages to her, is related to an owner and, if so, whether the Employer would replace the Alien with a worker who required the offered salary of \$7.00 per hour on a full-time basis. Finally, the CO determined that the Employer has not documented that either of the qualified U.S. applicants were rejected for lawful, job-related reasons as provided for in 20 C.F.R. § 656.21(b)(6).

Accordingly, the Employer was notified that it had until September 15, 1995, to rebut the findings or to cure the defects noted. The Employer requested an extension of time to rebut the Notice of Findings on September 6, 1995 (AF 71), and the CO granted this request on September 12, 1995 (AF 70), allowing the Employer until October 15, 1995, to file its rebuttal.

In its rebuttal, dated August 17, 1995 (AF 27-69), the Employer contended that she is paying wages to 52 employees, who each work at one of her six different restaurants, from \$4.25 per hour to almost \$10 per hour depending on their skill level. Accordingly, the Employer stated that she can “definitely afford” \$7 per hour. The Employer listed the employees and schedule of work as of the date of filing the rebuttal.

The Employer then contended that the Alien has no ownership or control over the business, and she has “absolutely no preference over the other workers,” and no ability to hire or fire. Finally, in response to the NOF regarding qualified U.S. workers, the Employer stated:

If pursuing people after they failed to attend a scheduled interview and hiring them on the spot after finally interviewing them does not appear that we made every possible attempt, then I don’t know what else I can do, because both are gainfully employed by me at this time.

The Employer also submitted several attachments to the rebuttal.

The CO issued the Final Determination on December 4, 1995 (AF 23-26), denying certification because the Employer remains in violation of the regulations at 20 C.F.R. §§ 656.21(b)(6) and 656.21(b)(5). Specifically, the Employer has failed to rebut the CO’s findings that U.S. workers were unlawfully rejected and that the requirement for two years of experience did not appear to represent the true minimum requirements. The CO determined that just because the Employer has found other jobs for two U.S. applicants, Mr. Sanchez and Ms. Jones, by referring them to another of her restaurants at some unspecified time after rejecting them for the instant position, does not remedy the failure to document that a good-faith effort was made to recruit these two applicants for the instant labor certification position. Additionally, the CO noted that work experience for the Alien remains undocumented by any payroll record or evidence of paid employment. Next, the CO determined that the Employer has failed to

demonstrate how experience gained at another Alberto's Mexican Restaurant is truly experience gained elsewhere.

On December 19, 1995, the Employer requested reconsideration of the Denial of Labor Certification (AF 2-22). The CO denied reconsideration on February 6, 1996 (AF 1), and in June 1996, forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board"). On July 10, 1996, the Employer filed a Petition to BALCA for Review of Denial of Certification.

Discussion

Section 656.20(c)(8) provides that the job opportunity must have been open to any qualified U.S. worker. As such, employers are required to make a good-faith effort to recruit qualified U.S. workers for the job opportunity. *H.C. LaMarche Ent., Inc.*, 87-INA-607 (Oct. 27, 1988). Further, § 656.21(b)(6) provides that an employer must show that U.S. applicants were rejected solely for lawful, job-related reasons. Therefore, actions by the employer which indicate a lack of a good-faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient U.S. workers who are "able, willing, qualified and available" to perform the work as required by § 656.1.

In this case, the Employer sent a letter to two applicants notifying them that she would be conducting interviews "on Friday morning at 7:30 a.m." (AF 105, 107). Both applicants were rejected for failing to attend the interview (AF 87). Accordingly, the CO, in the NOF, questioned whether the Employer recruited the applicants in good faith (AF 75). Specifically, the CO noted that the Employer did not submit a mail receipt showing when the letter was mailed (AF 76). The CO further noted that it was not clear from the letter which Friday the Employer intended to conduct the interview.

In rebuttal, the Employer stated that she further pursued these applicants and both of them are currently employed by her in different restaurants (AF 31). The Employer's rebuttal also includes a statement from each applicant indicating that they are currently employed by the Employer (AF 57-58).

We do not question the Employer's contention that she ultimately hired the two applicants in question for positions at different restaurants. However, we emphasize that the burden is on the Employer to establish that she put forth a good-faith recruitment effort with regards to the position available in this case only. Whether or not the applicants were adequately recruited for another position is irrelevant. We find that the Employer has not met this burden.

Neither the Employer's letters to the applicants nor her recruitment report specifies the date of the initial interview for which both applicants failed to appear (AF 87, 105-107). Moreover, it is unclear when the Employer contacted the applicants after they failed to appear for the interview (AF 31). It is quite possible that the Employer contacted these individuals after the CO issued the NOF as the Employer has not provided any specific dates regarding her recruitment efforts. In *Yaron Development Co., Inc.*, 89-INA-178 (Apr. 19, 1991) (*en banc*), the Board held

that a recruitment report must describe the details of the employer's recruitment efforts to be sufficient. Thus, an employer's recruitment report may be insufficient where it lacks details regarding the dates of contact with the applicants. Moreover, an employer cannot cure an initial violation of the regulations by offering the position to the applicant after the CO issued the NOF. *Kamal's Middle Eastern Specialties*, 95-INA-167 (Dec. 19, 1996). Thus, we find that the Employer has not provided sufficient details regarding her recruitment efforts.

Because the Employer in this case has not provided sufficient detail regarding her recruitment of the U.S. applicants and is relying on her own general assertions, we find that she has not met her burden of establishing a good-faith recruitment effort with regards to the position available in this case. Accordingly, the CO's denial of labor certification is hereby **AFFIRMED**.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: (1) when full Board consideration is necessary to secure or maintain uniformity of its decision; and, (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

*Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002*

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.